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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 ROGER FIANDER,

12 Defendant.
13

NO. CR-05-2099-RHW-8

**ORDER DISMISSING
INDICTMENT**

14 On May 18, 2007, the Ninth Circuit issued an opinion in *United States v.*
15 *Smiskin*, — F.3d —, 2007 WL 1452928 (9th Cir. May 18, 2007). In that case, the
16 court found that Yakama Tribal members' "possession and transportation of the
17 contraband cigarettes violated the terms of the CCTA" and questioned "whether a
18 violation of the State's pre-notification requirement can provide a valid basis for a
19 CCTA prosecution of Yakama tribal members." *Id.* at *2. The Ninth Circuit
20 answered that question in the negative, holding that the "Government cannot rely
21 on the State of Washington's pre-notification requirement as the basis for pursuing
22 a CCTA prosecution against tribal members of the Yakama Nation." *Id.* at *9.

23 In response to this holding, the Court issued an Order to Show Cause (Ct.
24 Rec. 417) directing the parties to show cause why the Indictment in the above-
25 captioned matter against Defendant Roger Fiander, a member of the Yakama
26 Nation, should not be dismissed. The Court received responses from Mr. Fiander
27 (Ct. Recs. 418 & 421) and from the Government (Ct. Rec. 420). Pursuant to Rule
28 34 of the Federal Rules of Criminal Procedure, the Court on its own "must arrest

1 judgment if: (1) the indictment . . . does not charge an offense[.]” After carefully
2 considering the parties’ arguments regarding the applicability of the *Smiskin*
3 holding to Mr. Fiander and the *Smiskin* decision itself, the Court finds dismissal of
4 the Indictment against Mr. Fiander is appropriate.

5 The Government argues dismissal is not proper for several reasons. It notes
6 that Mr. Fiander pled guilty to a violation of 18 U.S.C. § 1962(d), conspiracy to
7 violate the Racketeering Influenced Corrupt Organizations Act (RICO). It admits
8 the RICO conspiracy charge was based upon violations of the CCTA, but it avers
9 his participation in the conspiracy is not absolved by the Yakama Treaty right to
10 travel because Mr. Fiander was aware that his actions furthered the illegal goals of
11 the conspiracy. The Government contends Mr. Fiander was aware he was part of
12 the RICO conspiracy, he committed RICO overt acts by laundering proceeds from
13 contraband cigarette trafficking through transporting money, and he knew the
14 Contraband Cigarette Trafficking Act was being violated because he delivered
15 unstamped cigarettes in excess of the Yakama Tribal allotment under Washington
16 law. Mr. Fiander responds by pointing out that the Government agreed in the plea
17 agreement that the money laundering charge was “related to the offense of
18 contraband cigarette trafficking.” (Ct. Rec. 411, at 14). He also notes that the
19 Ninth Circuit in *Smiskin* specifically declined to exclude commercial exchanges
20 from the purview of the right to travel as reserved in the Yakama Treaty of 1855.
21 2007 WL 1452928, at *5.

22 Indeed, the Ninth Circuit did give the Yakama Treaty’s right to travel clause
23 an expansive reading in *Smiskin*, extending the right to encompass both travel and
24 trade. *Id.* (“Thus, whether the goods at issue are timber or tobacco products, the
25 right to travel overlaps with the right to trade under the Yakama Treaty such that
26 excluding commercial exchanges from its purview would effectively . . . render the
27 Right to Travel provision truly impotent.”). With this broad interpretation in mind,
28 the Court looks to Mr. Fiander’s plea agreement and its factual basis, along with

1 the Indictment, to determine whether the RICO conspiracy charge should be
2 dismissed.

3 It is clear in both documents that Mr. Fiander's involvement in the
4 conspiracy was limited to his role as a transporter of cigarettes and currency
5 between smoke shops on the Yakama Reservation and Co-Defendant Louie
6 Mahoney's residence in Plummer, Idaho. (*See* Ct. Rec. 1, at 8-9, 16-17, 22-26; Ct.
7 Rec. 411, at 12-13). The alleged illegality of Mr. Fiander's actions was his failure
8 to provide notice to the State of Washington before transporting the cigarettes from
9 Plummer back to the smoke shops on the Reservation. The *Smiskin* court in no
10 uncertain terms held that "the federal government cannot impose criminal
11 sanctions on [Yakama] tribal members for not providing notice to the State before
12 transporting tobacco for sale or trade." *Smiskin*, 2007 WL 1452928, at *4. Taking
13 this holding to its logical conclusion, the Court finds the Government likewise
14 cannot impose criminal sanctions on Mr. Fiander, a Yakama Tribal member, for
15 transporting the currency used to buy the tobacco or given in exchange for his
16 services in transporting that tobacco either. *See id.* at *5. Transporting payments
17 for trade goods and getting paid for such transport are part of travel and trade
18 covered by the Treaty. Both represent an unacceptable imposition on the Yakama
19 Right to Travel as reserved in the Treaty of 1855.

20 Regarding Mr. Fiander's knowledge of the conspiracy to violate the RICO,
21 at the change of plea hearing on April 19, 2007, Mr. Fiander explained that his
22 knowledge of the conspiracy was limited to his participation in it as a transporter of
23 cigarettes and currency. The *Smiskin* court made clear that this participation
24 cannot form the basis of a prosecution under the CCTA, which is the basis for the
25 money laundering and RICO charges. Although Mr. Fiander's lack of culpability
26 for his actions does not extend to his Co-Defendants—they still can be sanctioned
27 for their violations of the CCTA and for conspiracy to violate the RICO, his treaty
28 right to travel and trade as interpreted by the Ninth Circuit in *Smiskin* insulates him

1 from prosecution. As the charges against Mr. Fiander in the Indictment and to
2 which he pled guilty are based solely on his protected activity, the Court dismisses
3 the Indictment against him.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. The Indictment against Defendant Roger Fiander is **DISMISSED with**
6 **prejudice.**

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
8 Order, to provide copies to counsel, and to **close the file.**

9 **DATED** the 11th day of June, 2007.

10 *S/ Robert H. Whaley*

11 ROBERT H. WHALEY
12 Chief United States District Judge

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